Filed 5/14/12 In re A.H. CA4/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| In re A.H., a Person Coming Under the Juvenile Court Law. | |
| SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>U.H.,<br><br>Defendant and Appellant. | D060291<br><br>(Super. Ct. No. J517432) |

APPEAL from an order of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

U.H. appeals a juvenile court order, made at a postpermanency planning review hearing, continuing her minor son, A.H., as a dependent child placed in out-of-home care with a permanent plan of Another Planned Permanent Living Arrangement (APPLA) and denying U.H.'s request for further reunification services. U.H. contends her due process rights were violated because she did not receive proper notice of the review hearing. She

asserts this was structural error, requiring automatic reversal, or alternatively, the error was not harmless beyond a reasonable doubt. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2009, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court under Welfare and Institutions Code section 300, subdivision (b)[1] alleging 10-year-old A.H. was at substantial risk of harm because his mother, U.H., failed to adequately supervise him; A.H. was found running into traffic on highly traveled roads on numerous occasions; and A.H. behaved inappropriately in public and otherwise endangered himself. The petition also alleged U.H. refused to provide ongoing treatment for A.H., who had diagnoses of autism and type 1 diabetes, and she also refused to access necessary services for him. (§ 300, subd. (c).)

The social worker reported A.H. was a medically fragile child. In addition to his autism and diabetes, he had hypoglycemic seizure disorder, limited verbal skills and he required intensive supervision. Although A.H. was a client of the San Diego Regional Center, he was not receiving services.

U.H. declined to have an attorney appointed for her. The court set a special hearing to consider her motion to dismiss the petition, but she failed to appear. At the contested jurisdiction and disposition hearing, the court found U.H. would be better served by having an attorney appointed because she was delaying the proceedings by

1 Statutory references are to the Welfare and Institutions Code.

representing herself. The court appointed counsel for her and continued the hearing. However, at the continued hearing, the court granted U.H.'s *Marsden*[2] motion, relieved her attorney and allowed her to represent herself based on her assurances she would appear in court on time and be prepared.

U.H. was not present at the next hearing or the pretrial status conference. Even after the social worker personally delivered a letter to U.H. with notice of the new trial date, she did not appear. Finding U.H.'s self-representation had significantly delayed the proceedings to A.H.'s detriment, the court again appointed counsel for her.

After several additional delays, the jurisdiction and disposition hearing was held on October 9, 2009. The court sustained the allegations of the petition under section 300, subdivision (b) and ordered A.H. placed with his father. Two months later, Agency filed a section 387 supplemental petition alleging disposition had not been effective because A.H.'s father was not able to provide A.H. with the care he required.

At the time of the jurisdiction and disposition hearing on the section 387 petition, U.H. was living in Arizona. She appeared telephonically and demanded she be allowed to continue doing so despite court orders that she appear in person. The court sustained the allegations of the supplemental petition, placed A.H. in foster care and set a 12-month review hearing.

The contested 12-month hearing, originally set for July 26, 2010, was continued to September 17, 2010, to accommodate U.H.'s need to travel from Arizona. However,

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2 *People v. Marsden* (1970) 2 Cal.3d 118.

U.H. did not appear on that date. Although her counsel again requested she be allowed to appear telephonically, the court ordered her to be physically present for trial on November 8. U.H. did not appear on that date because an emergency required her to return to Arizona, but she had authorized her counsel to appear on her behalf. The court terminated U.H.'s reunification services and found the appropriate permanent plan for A.H. was placement with a confidential caregiver with a specific goal of independent living.

On May 26, 2011, the court held a special hearing to consider U.H.'s *Marsden* motion seeking removal of her attorney. U.H. was not present at that hearing. The court appointed new counsel for her and confirmed the June 10 pretrial status conference and the July 8 contested postpermanency planning review hearing. U.H. did not attend the June 10 pretrial status conference, choosing instead to remain outside the courthouse while her counsel represented her. The court found U.H. had received notice and notice was preserved. The court set another pretrial status conference for June 21. When U.H.'s counsel could not appear on that date because he was in the hospital, the court continued the pretrial status conference to June 28 and confirmed the July 8 contested review hearing. At Agency's request, the pretrial status conference was rescheduled for July 14 and the contested review hearing was rescheduled for July 22. On July 14, U.H. was not present but was represented by counsel. The court found U.H. had received notice and confirmed the July 22 contested review hearing date.

U.H. was not present on July 22 but was represented by counsel, who informed the court he had sent U.H. an e-mail the previous day to remind her about the hearing. The

court reviewed the prior minute orders regarding notice to U.H. Counsel told the court he was not raising the issue of notice. The court then found U.H. had received notice of the hearing and chose to appear through counsel. The court denied U.H.'s request for reinstatement of reunification services and continued A.H. as a dependent in out-of-home care with a permanent plan of APPLA.

## DISCUSSION

U.H. contends her due process rights were violated when the court conducted the July 22 contested review hearing without evidence she had actual notice of the new date and time of that hearing. She asserts there was no showing she was given a fair opportunity to participate in the case, and this constituted structural error, requiring automatic reversal. Alternatively, U.H. claims the error was not harmless beyond a reasonable doubt.

### A

"Notice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend." (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) Due process is a flexible concept that depends on the circumstances of the case and a balancing of various factors. (*In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053.)

Where, as here, the court conducts a postpermanency review hearing under section 366.3 to review the status of a child placed in long-term foster care, the parent is entitled

to receive notice of, and participate in, that hearing. (§ 366.3, subd. (f).) If the hearing is continued, there is no requirement to provide the parent with the identical statutory notice. (*In re Phillip F.* (2000) 78 Cal.App.4th 250, 258.) However, the parent must have actual notice, which may be inferred from the record. (*Id*. at p. 259.)

B

As Agency points out in its respondent's brief, U.H. did not raise the issue of due process notice in the juvenile court. Ordinarily, a parent's failure to object or raise certain issues in the juvenile court prevents the parent from claiming error on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Application of the so-called "forfeiture rule," although not automatic, is designed to keep litigants from acquiescing and later seeking relief for error that could have been prevented or cured. (*Ibid.*; *In re Riva M.* (1991) 235 Cal.App.3d 403, 412.) " ' "The law casts upon the party the duty of looking after his [or her] legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his [or her] objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." [Citation.]' [Citation.]" (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416; *In re R.C.* (2008) 169 Cal.App.4th 486, 492-493.) Even a claim that the due process right to notice was violated may be forfeited by not asserting that claim in the trial court. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060; *People v. Barnum* (2003) 29 Cal.4th 1210, 1223-1224; *In re Desiree M.* (2010) 181 Cal.App.4th 329, 334 [by not objecting in the juvenile court, mother forfeited right to

challenge notice received by minors]; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 222 [mother forfeited due process claim by not bringing it to juvenile court's attention].)

Although we have discretion to excuse forfeiture, we exercise that discretion rarely and only in cases presenting an important legal issue. (*In re S.B., supra*, 32 Cal.4th at p. 1293.) Failure to enforce the forfeiture rule is manifestly unfair to the adverse party and the court because it would permit a parent to deliberately remain silent and permit the proceedings to reach a conclusion in which the parent could acquiesce if favorable and avoid if unfavorable. (*In re Riva M., supra*, 235 Cal.App.3d at p. 412.) This is especially true in dependency proceedings where "considerations such as permanency and stability are of paramount importance." (*In re S.B.*, at p. 1293.)

Here, U.H. was not present at the July 22 contested review hearing, but was represented by competent counsel, who indicated he had sent her an e-mail the day before as a reminder. The court nevertheless expressed its concern about U.H.'s absence, and summarized the steps taken to provide U.H. with notice of the hearing. The court then asked counsel if he was raising the issue of notice to U.H. Counsel responded, "No, Your Honor," and stated the only issue for trial was reinstatement of reunification services for U.H. Because counsel, who had knowledge of the facts, expressly declined to challenge the propriety of notice U.H. received, any claim of a due process violation has been

forfeited.[3] (See *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339 [where there is no objection, silent parent may not argue juvenile court "erred in not being psychic"]; see also *In re Jamie R.* (2001) 90 Cal.App.4th 766, 772 [doctrine of invited error applies where party, for tactical reasons, persuades court to follow a particular procedure].)

C

Even were we to excuse forfeiture, U.H. has not shown her due process right to notice was violated. As U.H. acknowledges, the court may infer actual notice from the facts of the case even in the absence of direct evidence of notice. (*In re Phillip F.*, *supra*, 78 Cal.App.4th at p. 259.) Nevertheless, U.H. contends the record does not permit a reasonable inference she had actual notice of the July 22 hearing.

U.H. claims the facts suggest she had been unable to adequately communicate with her attorneys about the case. The record shows U.H. sometimes appeared in court, and other times appeared through counsel. She had a history of failing to appear even when she had proper notice. Regardless of her problems and conflicts with previous counsel, her most recent counsel never indicated there was a breakdown in communication with his client. In fact, U.H.'s trust in her counsel was evident when, at the June 10, 2011, pretrial settlement conference, U.H. authorized him to appear for her while she remained outside the courthouse. Counsel assured the court he would inform

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[3] We disagree with U.H.'s argument, based on the holding in *People v. Welch* (1993) 5 Cal.4th 228, 237, that the issue of notice is not forfeited because any objection by her counsel would have been futile or "fruitless." Whether U.H. had notice of the hearing was not a pure question of law that could be resolved without reference to the facts developed in the juvenile court. (*Ibid.* [recognizing exception to forfeiture rule for challenges to probation conditions that raise pure questions of law].)

U.H. of the next hearing dates, including the contested postpermanency planning review hearing. When the court inquired as to U.H.'s whereabouts at that hearing, counsel said he "sent [U.H.] an e[-]mail yesterday to remind her of the hearing today," indicating he remained in contact with her and she was aware of the hearing. From this, the court could have inferred that U.H. "had actual notice of the continued hearing because her appointed counsel had notified her of the continued hearing dates in conformance with counsel's statutory obligation to provide competent representation. (§ 317.5, subd. (a).)" (*In re Phillip F., supra,* 78 Cal.App.4th at p. 259.) Thus, the record allows a reasonable inference that U.H. had actual notice of the July 22 hearing but chose to appear only through counsel.

U.H. further claims the court's notice findings were based on its erroneous belief she had received minute orders from prior hearings that informed her of the contested review hearing date. As U.H. points out, written notice of the July 22 contested review hearing was contained in the June 28 and July 14 minute orders and mailed to her, but the proof of service forms attached to those minute orders each had an incorrect address.[4] There is no indication in the record the mail was returned to the court and, thus, it is unclear whether U.H. received the minute orders. But even if the court was mistaken about whether the minute orders were delivered to U.H.'s address, the court could have reasonably inferred from counsel's statement declining to challenge notice that U.H. had

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4 U.H. notified the court of her Phoenix address. In the proof of service for the June 28 minute order, U.H.'s address is listed with a partial street name. In the proof of service for the July 14 minute order, her address is listed with the wrong apartment number.

actual notice and simply chose not to attend. Because the court ensured U.H. had been actually notified of the July 22 hearing in time to appear, there was no due process violation.[5]

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.

[5] Having concluded there was no error, we need not address U.H.'s arguments on structural versus harmless error.